

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 8: Division 1, Chapter 4, Subchapter 4, Construction Safety Orders,
Article 12, Section 1600 and Article 15, Sections 1610.1, 1610.3, 1610.4, 1610.9, 1611.1,
1612.3, 1613, 1613.2, 1613.10, 1616.1, 1617.1, 1617.2, 1617.3, 1618.1, and 1619.1 and
New Sections 1613.11 and 1613.12; and Subchapter 7, General Industry Safety Orders,
Article 191, Section 4885 and Article 98, Section 4999

Cranes & Derricks in Construction (Clean-Up)

MODIFICATIONS AND RESPONSES TO COMMENTS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD

There are no modifications to the information contained in the Initial Statement of Reasons.

Summary and Responses to Oral and Written Comments:

I. Written Comments

**Terry D. Thedell, Ph.D., CIH, CSP, Health and Safety Advisor, San Diego Gas & Electric,
by letter dated May 29, 2012.**

Comment No. 1:

Mr. Thedell expressed support for adding new Section 1612.3(b) which prohibits operations above energized overhead electrical distribution and transmission lines except where they have been de-energized and visibly grounded.

Board's Response:

The Board notes Mr. Thedell's comment.

Comment No. 2:

Mr. Thedell expressed support for new Exception 3 to Section 1618.1 which will exempt electric line trucks (digger derricks) from crane operator qualification and certification standards, and will align the Construction Safety Orders (CSO) with the General Industry Safety Orders (GISO), Section 5006.1, Exception 2.

Board's Response:

The Board notes Mr. Thedell's comment.

The Board thanks Mr. Thedell and San Diego Gas & Electric for their interest and participation in the rulemaking process.

Kenneth J. Thomas, Vice President, Jonce Thomas Construction Co., Inc., by letter dated June 18, 2012.

Comment No. 1:

Mr. Thomas understands that the CSO exclusion for forklifts [1610.1(c)(8)] was adopted verbatim from the federal standard; however, he hopes the Board will reconsider its position and exclude all forklifts from the scope of CSO, Article 15.

Board's Response:

Note: The forklift exclusion [1610.1(c)(8)] was a part of the original (federal) rulemaking, and its wording has created considerable confusion as to its intent and application. Section 1610.1(c)(8) requires certification for operators of forklifts configured as described in that subsection. Section 1610.1(c)(8) does not appear in this clean-up rulemaking, because no changes are proposed for reasons explained in the response to Mr. McClelland's oral comment (received at the public hearing). However, this comment, and several other comments are related to the federal verbiage.

The forklift exclusion was discussed extensively at a two-day advisory committee convened for this rulemaking; however, no consensus could be reached on how to clarify the verbiage. The Board is required to be at least as effective as the federal standard, and thus, it cannot exclude all forklifts from the scope of the standard.

Comment No. 2:

Mr. Thomas stated that there is no applicable certification program for operators using forklifts configured with a winch or hook to hoist and horizontally move a suspended load.

Response:

See the Board's response to Dana Lahargoue, Written Comment No. 2.

Comment No. 3:

Mr. Thomas stated that the training requirements for operators of cranes and forklifts are addressed separately in both federal and state regulations. Mr. Thomas believes that although GISO, Section 3668 contains specific training requirements for forklift operators, it does not require that the forklift operator be a certified crane operator when performing certain tasks. He opines that Section 3668 is the authority when it comes to forklift training and that it is unnecessary and confusing to include additional forklift operator certification in CSO, Section 1610.1(c)(8).

Board's Response:

See the Board's response to Dana Lahargoue, Written Comment No. 3.

Comment No. 4:

Mr. Thomas stated a review of OSHA fatality and catastrophe investigation summaries from 1998 to 2010 related to forklifts revealed no accidents involving hook, jib or winch attachments, and thus, does not support the necessity for this regulation.

Board's Response:

The Board is required to adopt standards that are at least as effective as (ALAEA) federal standards, and is therefore, unable to make the changes requested by the commenter. The ALAEA requirement constitutes the necessity.

The Board thanks Mr. Thomas for his interest and participation in the rulemaking process.

Michael J. Vlaming, Executive Director, Crane Owners Association, Inc., by letter dated June 20, 2012.

Comment:

Mr. Vlaming, on behalf of the members of the Crane Owners Association, wrote to express their support for the proposed changes to the various sections of the Construction and General Industry Safety Orders applicable to Cranes and Derricks. He noted that these changes were the result of a two-day advisory committee which members of the Crane Owners Association and the Mobile Crane Operators Group participated in.

Board's Response:

The Board notes Mr. Vlaming's comment.

The Board thanks Mr. Vlaming and the Crane Owners Association for their interest and participation in the rulemaking process.

**Dana Lahargoue, Chair, Safety Committee, Construction Employers' Association (CEA),
by letter dated June 21, 2012.**

Comment No. 1:

CEA had previously (by letter received March 27, 2012) requested the Board to seek clarification from federal OSHA regarding CSO, Section 1610.1(c)(8), exclusion for forklifts.

Board's Response:

The Board responded to CEA's letter on April 5, 2012. CSO, Section 1610.1(c)(8) is verbatim of 29 CFR 1926.1400(c)(8). California is required to be at least as effective as federal standards. In response to CEA's request, the Board contacted Federal OSHA Region 9, and they were unable to tell us when clarification may be forthcoming. Until such time as federal OSHA clarifies the intent and meaning of exclusion subsection (c)(8) to 29 CFR 1926.1400 (Scope) or amends its standard, the counterpart state standard remains verbatim of the federal standard. Therefore, stakeholder requests for clarification of the exclusion for forklifts should be directed to federal OSHA.

Comment No. 2:

At this time, the National Commission for Certification of Crane Operators (NCCCO) does not include forklifts as one of the four designated crane categories for which it offers certification. CEA stated that there is no applicable crane certification for operators using a forklift configured with a winch or hook to hoist and horizontally move a suspended load.

Board's Response:

Section 1618.1(b)(1) requires that where certification is required, the employer shall only permit operators who have a valid certificate of competency, issued by an accredited certifying entity for the type of crane to be used to operate the crane. Although NCCCO (an accredited certifying entity) does not currently have a certification program for forklifts configured as described by Section 1610.1(c)(8), an NCCCO representative indicated at the June 21, 2012 Public Hearing that they plan to establish such a program. The representative indicated they have been in discussions with federal OSHA and are awaiting further guidance before proceeding to develop a certification program. Until such time as federal OSHA provides guidance and NCCCO develops a certification program, stakeholders should address this concern to the Division of Occupational Safety and Health (Division).

Comment No. 3:

Ms. Lahargoue opines that training requirements for forklift operators are addressed separately in GISO, Section 3668, Powered Industrial Truck Operator Training, and it is unnecessary and

confusing to include additional forklift operator certification requirements in CSO, Section 1610.1(c)(8).

Board's Response:

Powered industrial trucks (PIT)/forklifts used in construction are excluded from Title 8, CSO, Article 15, except when they are configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load. This is a federal OSHA requirement promulgated subsequent to the PIT operator training requirements of GISO, Section 3668. As such, Article 15 will apply only to PIT/forklifts used in construction when they are configured as described in Section 1610.1(c)(8).

Comment No. 4:

Ms. Lahargoue quoted a federal preamble for 29 CFR 1926.178 in support of their position that the state counterpart, GISO, Section 3668, Powered Industrial Truck Operator Training, contains a comprehensive list of training elements for forklift operators. She also referenced the preamble for 1926.602(c)(1)(ii) which states that when a PIT is used with specialized attachments, operator training must include instruction on the safe conduct of those operations so that the vehicle operator knows and understands the restrictions imposed on vehicle operation in these situations.

Board's Response:

The first preamble citation was cited as being for 29 CFR 1926.178 (construction); however, there is no 29 CFR 1926.178. This appears to have been a typographical error and the correct citation should have been 29 CFR 1910.178 which contains training requirements for forklifts in general industry. However, the Title 8 forklift exception is for forklifts used in construction. The hazards of forklift operation in construction (e.g. rough terrain, variable ground conditions) are different than general industry. Therefore, forklifts in construction are more specifically addressed in 29 CFR 1926.1400 and in Title 8, CSO, Article 15.

With respect to the preamble citation for 1926.602(c)(1)(ii), the actual regulatory text of 1926.602(c)(1)(ii) does not contain any requirements for operator training or certification. In any event, preamble verbiage is unenforceable.

In conclusion, federal standards for forklifts in construction supersede the sections cited and are more specific in their application.

Comment No. 5:

Ms. Lahargoue stated that the lack of accident statistics involving forklifts configured with lifting attachments does not support the necessity for this regulation.

Board's Response:

The Board is required to adopt standards that are at least as effective as (ALAEA) federal standards, and is therefore unable to make the changes requested by the commenter. The ALAEA requirement constitutes the necessity.

The Board thanks Ms. Lahargoue and CEA for their interest and participation in the rulemaking process.

Jakki Kutz, President, Allied Framers, Inc., by letter dated June 21, 2012.

Comment No. 1:

Mrs. Kutz believes the crane operator certification requirement is intended for cranes and not for forklifts modified with a winch or hook. She is of the opinion that, despite the addition of an attachment to a forklift to hoist, lower and horizontally move a suspended load, the forklift is not a crane.

Board's Response:

The Board is obligated to adopt standards at least as effective as the federal standards. The federal standards require certification of forklift operators when configured as described in CSO, Section 1610.1(c)(8).

Comment No. 2:

Mrs. Kutz understands that the CSO exclusion for forklifts [1610.1(c)(8)] was adopted verbatim from the federal standard; however, she hopes the Board will reconsider its position and exclude all forklifts from the scope of CSO, Article 15.

Board's Response:

The forklift exclusion was discussed extensively at a two-day advisory committee convened for this rulemaking; however, no consensus could be reached on how to clarify the verbiage. The Board is required to be at least as effective as the federal standard, and thus, it cannot exclude all forklifts from the scope of the standard.

Comment No. 3:

Mrs. Kutz also notes that there is currently no applicable crane operator certification for operators using forklifts configured as described by CSO, Section 1610.1(c)(8).

Board's Response:

See the Board's response to Dana Lahargoue, Written Comment No. 2.

Comment No. 4:

Mrs. Kutz is of the opinion that training requirements for operators of cranes and forklifts are addressed separately in both federal and state regulations. She believes that, although GISO, Section 3668 contains specific training requirements for forklift operators, it does not require that the forklift operator be a certified crane operator when performing certain tasks. Mrs. Kutz opines that Section 3668 is the authority when it comes to forklift training and that it is unnecessary and confusing to include additional forklift operator certification in CSO, Section 1610.1(c)(8).

Board's Response:

CSO requirements for forklift operators take precedence over the GISO where the general orders are inconsistent [CSO, Section 1502(b)]. CSO, Section 1610.1(c)(8) only requires operators of forklifts configured as described in this subsection to be certified.

Comment No. 5:

A review of OSHA fatality and catastrophe investigation summaries from 1998 to 2010 related to forklifts revealed no accidents involving hook, jib or winch attachments, and thus do not support the necessity for this regulation.

Board's Response:

See the Board's response to Dana Lahargoue, Written Comment No. 5.

The Board thanks Mrs. Kutz and Allied Framers for their interest and participation in the rulemaking process.

Kate Smiley, Safety and Health Regulatory Services, AGC California, by email dated June 21, 2012.

Comment:

Ms. Smiley noted that several construction industry groups went on record at the June 21, 2012 Public Hearing regarding the forklift exclusion of Section 1610.1(c)(8). The AGC believes that the Board should consider re-opening the dialogue on this exclusion. Specifically, they support the comments made by Kevin Bland proposing a 15-Day Notice to consider modifications reflecting the consensus of oral comments received at the public hearing.

Board's Response:

This rulemaking proposal is the result of a two-day advisory committee convened October 4-5, 2011. The forklift exemption was considered at some length by the committee on both days. Two different and inconsistent agreements were reached during the two days of deliberations, owing to the fact that two key stakeholders were unable to be in attendance on the same day. Thus, there was no agreement on alternative language, and Section 1610.1(c)(8) remains verbatim of the federal standard [29 CFR 1926.1400(c)(8)]. Although the federal verbiage certainly leaves questions unanswered, federal OSHA has not provided further direction at this time, and, as one of the advisory committee members opined, attempting to interpret federal intent would be at our peril.

Until such time as federal OSHA clarifies the intent and meaning of the exemption to 29 CFR 1926.1400(c)(8) or amends its standard, interpretation and enforcement will be a matter for the Division.

The Board thanks Ms. Smiley and AGC of California for their interest and participation in the rulemaking process.

David Y. Shiraishi, MPH, Area Director, Occupational Safety and Health Administration, Oakland Area Office, by letter dated June 22, 2012.

Comment:

Mr. Shiraishi indicated that the proposed occupational safety and health standard appears to be commensurate with the federal standards.

Board's Response:

The Board thanks Mr. Shiraishi and Federal OSHA for their participation in the rulemaking process.

II. Oral Comments

Oral comments received at the June 21, 2012 Public Hearing in Sacramento, California.

Dana Lahargoue, representing Roebbelen Contracting and Construction Employers' Association (CEA).

Comment:

Ms. Lahargoue summarized her written comments for CEA by stating she would like the Board to exclude all forklifts from the scope [Section 1610.1(c)(8)], because forklifts are not cranes, and forklift training as addressed in Section 3668 should be adequate.

Board's Response:

See the Board's response to Dana Lahargoue, Written Comment No. 3.

The Board thanks Ms. Lahargoue, Roebbelen Contracting, and CEA for their interest and participation in the rulemaking process.

Greg McClelland, Director of Safety, representing Western Steel Council and CIEC/DCIW Safety Institute.

Comment:

Mr. McClelland participated in the advisory committee and he opined that Section 1610.1(c)(8) is not written as agreed upon. He recalled that consensus was reached to use the words "winch and hook" and not "winch or hook". Mr. McClelland concurred with Ms. Lahargoue's comments regarding the forklifts exclusion.

Board's Response:

As noted previously, there were two apparent agreements reached on proposed changes to Section 1610.1(c)(8) during the two-day advisory committee. The agreement reached on the first day of deliberations would have deleted the parenthetical expression "(by means of a winch or hook)." The committee revisited this section during deliberations on the second day. Mr. Bland, who had been unable to attend the first day, stated that he did not want a forklift "to become a crane unnecessarily." However, discussion of the exclusion was complicated by the verbiage in the federal standard, making federal intent unclear, even after considering the federal preamble. Mr. Bland proposed the following definition: "Powered industrial trucks (forklifts), except when configured to hoist and lower (by means of a winch or ~~hook~~ hoist) and horizontally move a suspended load." There was discussion of changing "winch or hook" to "winch and hook," but the change to "winch and hook" changes the meaning and narrows the effect of the parenthetical expression, and there was no agreement to make this change. Initially, it appeared that the committee had agreed to Mr. Bland's proposal to change the exclusion to read "Powered industrial trucks (forklifts), except when configured to hoist and lower (by means of a winch or ~~hook~~ hoist) and horizontally move a suspended load;" however, the minutes were challenged and subsequent review of the proceedings indicated that labor and at least one subject matter expert did not agree with this proposal. Thus, the Board sent a correction letter to all committee members on January 4, 2012. The committee did not reach a consensus on changing the forklift exclusion and, there is no reason to believe that revisiting the subject again would produce a different result.

Kevin Bland, representing California Framing Contractors' Association (CFCA) and Residential Contractors' Association (RCA).

Comment No. 1:

Mr. Bland stated that he participated in the advisory committee for this proposal and he opposes the word “or” in Section 1610.1(c)(8). He stated that the language should stay as currently written, but replace the word “or” with “and” as agreed upon by the advisory committee.

Board’s Response:

See the Board’s response to Mr. McClelland.

Comment No. 2:

Mr. Bland further stated that once you put a hook on a forklift, the forklift falls into the crane operator certification requirements, and there is not a crane operator certification category for this type of equipment.

Board’s Response:

With regards to operator certification, see the response to Dana Lahargoue, Written Comment No. 2.

The Board thanks Mr. Bland, CFCA, and RCA for their interest and participation in the rulemaking process.

Bob Hornauer, Manager of California Affairs, National Commission for Certification of Crane Operators (NCCCO).

Comment:

Mr. Hornauer stated that no program currently exists to certify forklift operators to operate forklifts as cranes. He updated the Board on the plans to establish such a program. Mr. Hornauer stated that NCCCO has had numerous discussions with federal OSHA and they are awaiting further guidance before proceeding to develop a certification program.

Board’s Response:

The Board thanks Mr. Hornauer and NCCCO for this information and for their interest and participation in the rulemaking process.

Board Member David Harrison.

NOTE: Mr. Harrison participated as a member of the advisory committee prior to his appointment to the Board.

Comment:

Board Member Harrison stated that he was part of the advisory committee and he recalled that the consensus was to change “winch or hook” to “winch or hoist.” However, changing back to the original “winch or hook” is acceptable. He stated that changing “winch or hook” to “winch and hook” is not at least as effective.

Board Member Harrison added that he was aware of a reportable accident involving a forklift equipped with a winch. He stated that, as an Operating Engineers, Local 3, representative, he can testify to several rollovers that occurred on equipment using hooks, jibs and winches.

Board’s Response:

The Board thanks Board Member Harrison for his participation in the rulemaking process.

Board Member William Jackson.

Comment No. 1:

Board Member Jackson asked whether the standard as it exists today requires the certification of a forklift operator.

Board’s Response:

GISO, Section 3668 requires the employer to certify that each powered industrial truck operator/employee has been trained and evaluated as required by Section 3668; however, 3rd party certification is not required; i.e., the employer may conduct the training and certify the operator.

Board’s Comment No. 2:

Board Member Jackson asked if it is possible for employers to have their forklift operators independently certified. He also asked will employers be able to comply with this standard.

Board’s Response:

It is believed that Board Member Jackson was referring to having forklift operators certified where required by CSO, Section 1610.1(c)(8). See the response to Dana Lahargoue, Written Comment No. 2.

The Board thanks Board Member Jackson for his participation in the rulemaking process.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

These standards do not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES CONSIDERED

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to the attention that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.